Supreme Court, U.S.
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IN THE

UPREME COURT OFTHE UNITED STATES

BERT C. WILSON

Plaintiff and Appellant,

vs.

CHAEL D. BEGAN, OCEAN ORTHOPEDIC

Defendants and Respondents.

After A Decision By The Court Of Appeal
Second Appellate District, Division 6

PETITION FOR WRIT OF CERTIORARI

Robert W. Wilson
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Plaintiff/Appellant In Pro Per

QUESTIONS PRESENTED

1. Did the State Appellate Court's interference with petitioner's presentation at oral arguement violate petitioner's due process rights?

3. Did the State Appellate Court violate petitioner's due process rights by failing to recusing itself in light of Petitioner's filing a complaint against it with Commission on Judicial Performance ?

3. Did the State Appellate Court failure to prohibit the trial court judge from hearing anymore motions violate petitioner's due process rights? Did the State Appellate Court further deny petitioner's due process rights of substantial justice and fundamental fairness by requesting the trial court determine the costs of the appeal, knowing that the trial court judge had a demonstrated bias against petitioner and had previously ruled contrary to statute,law and evidence regarding petitioner's rights?

4. Did the State Trial and Appellate Court's contrary to law determination of petitioner as a vexatious litigant violate petitioner's due process rights?

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OPINIONS BELOW

The judgment of the Superior Court for Ventura County is in the Appendix. ("App."), along with the opinion of the Court of Appeal for 2nd Appellate District Division 6, and orders denying the petition for rehearing and petition for review.

BASIS FOR JURISDICTION

Trial Court Judgment for Defendants filed October 31,1997

Appellate review affirming judgment on December 12,1998

Petition for rehearing denied on January 11,1999

Petition for Review denied on March 24,1999

THE CONSTITUTIONAL PROVISION

The 14th amendment to the U. S. Constitution, Section 1, "No state shall make or enforce any law which shall abridge the priveledges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction equal protection of the law."

NATURE OF THE CASE AND PROCEDURAL HISTORY

A. Plaintiff in good faith filed the prior action for negligence in disclosing confidential information based on all available facts and recommendations of legal professionals.

Plaintiff and Petitioner, Robert C. Wilson, hereinafter "Plaintiff", was employed by the US Navy as an electrical engineer from April 1988 until April 1995. Plaintiff on or about September 10, 1991, was preliminarily diagnosed as having carpal tunnel syndrome, a neurological injury, caused or aggravated by his employment and filed a Workers' Compensation claim with Mary Wedel, an employee of the U.S. Navy. On December 30, 1991, on referral of his primary care physician, Plaintiff saw Defendant for orthopedic evaluation. Just prior to consultation, Ann, an employee of Defendant, assisted Plaintiff in completing the patient information sheet by annotating "Blue Cross Blue Shield" along with Plaintiff s insurance identification number.

During the consultation, Defendant told Plaintiff he "didn't think (Plaintiff) had carpal tunnel syndrome" and suggested Plaintiff might have gotten the injury from "lifting something very heavy". After the office consultation and in response to Plaintiff's telephone inquiries, Ann informed Plaintiff there would be no report based on the fact that Plaintiff's insurance carrier, Blue Cross Blue Shield did not require reports. On January 6, 1992, upon learning of the office visit from Lisa, Plaintiff's primary care physician's office manager, Mary Wedel, contacted Defendant's front office and provided Plaintiff's Workers Compensation claim information. Ann acknowledged to Plaintiff that Mary contacted her and stated to Plaintiff that she had not spoken to Defendant, but reiterated that as far as she knew there would be no report to the U.S. Department of Labor. On January 8, 1992, Plaintiff received an acknowledgment from the U.S. Department of Labor that his Workers' Compensation claim had been filed.

At Plaintiff's request, in February 1992, Plaintiff began receiving billing from Defendant for the office visit of December 30, 1991. On February 19, 1992, Plaintiff's primary care physician's office manager, Lisa, advised him that she had received a copy of Defendant's report from Defendants's office. On February 19, 1992, Plaintiff first saw the report, which was addressed to "Mary Wedel, U.S. Department of Labor". Plaintiff did not know until he saw the report that Defendant concluded he "couldn't do anything for (Plaintiff) orthopedically" and that Plaintiff may " benefit from a psychiatric consultation". Just after Plaintiff saw the report, Lisa threatened to send the report to the U.S. Department of Labor in response to Plaintiff's concerns. Plaintiff asked Defendant's front office about report, and was informed that the report had not actually been sent to the U.S. Department of Labor, because Plaintiff had requested billing.

Concerned about Lisa's threat, Plaintiff obtained a complete copy

of his Workers' Compensation claim file from the U.S. Department of Labor in June 1992. Defendant's report was not there. Prior to receiving a copy of his file from the U.S. Department of Labor, Plaintiff's Workers' Compensation claim had been approved in March 1992. Because Plaintiff was required by his employer to attend civilian employee assistance program counseling in late August 1992, and being suspicious that this was due to Defendant's belief that he would benefit from a psychiatric consultation, on Sept. 3, 1992, Plaintiff went to Defendant's office and obtained a copy of his medical file. Plaintiff only obtained a copy of letter from Mary Wedel, addressed to Defendant, along with copy of the report. Defendant's front office stated "that's all there is". The letter demonstrated that Mary Wedel had identified herself to Defendant as an employee of the Dept. of Navy. At that time Plaintiff believed that Defendant had sent the report to Mary Wedel at the Department of the Navy, regarding Defendant's

belief that Plaintiff would benefit from a psychiatric consultation. Upon advice of legal services plan and assistance of counsel that quit shortly after filing complaint, Appellant filed negligence and breach of physician/patient duty regarding confidential communications against Defendant on September 3, 1993.

On February 8, 1994, Plaintiff contacted Mary Wedel and asked for a copy of another letter that Plaintiff had lost. Mary informed Plaintiff that she would leave her file on her desk and Plaintiff could come to her office and obtain a copy of the letter Plaintiff had lost. While looking through Mary's file, Plaintiff saw for the first time a record of a conversation dated February 27, 1992. The record of the conversation reflected that the U.S. Department of Labor informed the US Navy that it was going to deny Plaintiff's claim for injury because Plaintiff's "problem may be psychological". This is the first time that Plaintiff suspected that Defendant's report had been sent to the U.S. Department of

Labor by Defendant, and that Defendant's representations to Plaintiff that the report had not been sent to the U.S. Department of Labor, nor would be sent to the U.S. Department of Labor , were false. Plaintiff rushed to a copy machine and copied the February 27, 1992, conversation. Mary requested Plaintiff return the copy, stating that "it was not" Plaintiff's property. Plaintiff declined. Shortly thereafter, on 2 separate occasions Plaintiff requested in discovery that Defendant provide a medical billing document (which when Plaintiff was ultimately able to obtain it, reflected that the report had been sent to the U.S. Department of Labor on January 7, 1992), both of which were denied by the trial court. During deposition, Amparo, employee of Defendant, informed Plaintiff again it had withheld sending report because it had billed Plaintiff at his request and added that they "didn't do their billing right away". Amparo also described the medical billing document later during the deposition. Plaintiff went back to the trial court and again requested the medical billing

document, which Defendant provided just before a summary judgment hearing at the request of the trial court. The medical billing document was dated January 7, 1992. Prior to the summary judgment hearing, Plaintiff filed a request for continuance regarding the medical billing document and deposition testimony of Mary Wedel, which the trial court denied.

At the summary judgment hearing, the Trial Court determined that pleadings were defective, did not give Appellant leave to amend, but granted summary judgment for Defendants. On appeal, Appellant requested review for abuse of discretion, citing the Trial Courts own determination of defective complaint and pleadings. Because of many continuances being denied, Appellant requested the Appellate Court take additional evidence to further review for abuse.

In the Appellate Court's independent review, they cited certiorari

uncontradicted facts and stated there was no triable issue of fact. They further denied without cause Appellant's requests to take additional evidence, and concurred with the Trial Courts ruling.

In his petition for rehearing, Plaintiff cited evidence which contradicted the Appellate Courts uncontradicted facts and demonstrated a triable issue within those facts. Plaintiff also reasserted the defective pleadings and complaint issue, the requests to take additional evidence, as well as the issues noted above which were not addressed or part of the Appellate Court's decision. The Appellate Court denied the rehearing request. A Petition for Review was denied by this Court, as was a Petition for Certiorari by the U.S. Supreme Court. On February 4, 1997 Plaintiff filed a complaint with the Commission on Judicial Performance against Judges Stone, Gilbert & Yegan.

B. In good faith, Plaintiff filed the current complaint

based on facts not part of prior complaint and a different right

On February 7, 1997, after the Petition for Certeori had been denied, and within the statute of limitations for the facts of fraud that Plaintiff did not discover until February 8, 1994, and after July 25, 1994, Plaintiff filed the instant action. The specific fraud alleged that Defendant told Plaintiff that it withheld the report and only billed Plaintiff for the office visit of December 30, 1991, when in reality it billed the U.S. Department of Labor for the office visit of December 30, 1991, and on January 7, 1992 had sent the report to the U.S. Department of Labor. Plaintiff did not discover until February 8, 1994, that U.S. Department of Labor apparently did receive the report, and did not discover until after July 25, 1994, when Defendants provided the medical billing reflecting that on January 7, 1992, Defendant had sent report and billed U.S. Department of Labor, and has billed it for

it. Plaintiff's current complaint asserted that Defendant disclosed information not confided (App. 11a-21a), and made fraudulent representations to Plaintiff in this regard, which is a different right than the prior complaint (App.22a-25a) of disclosure of confidential communication because of the case law Britt v. Superior Court ("Britt") (1978) 20 Cal 3d 844 and Evidence Code 992 and 994, and Ball v. Stevens ("Ball") (April 24, 1945) 68 CA 2d 843. Specifically, disclosure of confidential communication is not in violation of law because the employee "tenders the issue" in a work comp claim case. See Britt. According to Evidence Code 992 and 994, to be considered "confidential communication", the physician must make the statements to the patient during consultation, which as shown in the evidence of prior action (App. 26a-27a) and current complaint (App. 19a,para10), the physician did not do. As basis for filing thee new action, petitioner relied on Ball. In Ball, the court determined that plaintiff's current action regarding public

road was not barred since the prior action alleged the same road was private even though the evidence demonstrated the road was public. In parallel with Ball, petitioner's current action (App.11a-21a) is not barred since prior action alleged discloure of confidential communication (App. 23a #14), even though evidence (App. 27a #9) demonstrated communication was not confided.

The trial court made a ruling that Plaintiff's action would be stayed indefinitely, pending compliance with the vexatious litigation statutes, and required Plaintiff to post a $30,000 bond in order for the action to proceed. The Plaintiff sought issuance of a writ of mandate from the Appellate Court, dispensing with the bond requirement, which the Appellate Court denied. The trial court then granted a demurrer, without leave to amend, on the ground that the rule of res judicata precluded this action. The trial court also imposed sanctions against Plaintiff, in the amount of $8,954.00, to be recovered from the bond. This appeal

followed.

Defendant sought to dismiss the appeal, on the ground that Plaintiff had not received permission to proceed with the appeal, pursuant to to CCP §391.7. The Appellate Court denied the motion stating there was "cause appearing" and continued the appeal on condition that the remaining funds deposited by Plaintiff with the Clerk of the Superior Court ($21, 046.00) remain on deposit throughout the pendency of the appeal as security for any costs incurred by Defendant in defending the appeal, upon a determination that the appeal was frivolous.

As is reflected in the opinion (App. 4a-10a), the Appellate Court later upheld the sustaining of the demurrer without leave to amend and the awarding of sanctions It also determined that Plaintiff's appeal was frivolous, and remanded the action to the trial court, for determination of sanctions, measured by

reasonable attorneys and costs incurred in defending the appeal, also to be awarded from the security deposit made by Plaintiff.

ARGUMENT

The Trial and Appellate Court's bias violated Petitioner's due process rights to an impartial judiciary.

"Observance of right to an impartial judge is required to meet minimum standards of due process" Taylor v. New York City Transit Authority 309 F Supp 785.

Petitioner respectfully requests the Court to review "in light of the whole record" El Ranco Inc. V. First National Bank (1968) 406 F2d 1205. Petitioner further requests the Court to consider the comments and conduct of Judge Lane, along with Justices Gilbert, Stone, and Yegan.

Government of Virgin Islands ex rel King v Walcott D.C. Virgin Islands (1969)300 F. Supp 855.

A. In violation of statute, law, and evidence, the trial court

stated at the beginning of the hearing it planned to declare plaintiff a vexatious litigant, later ruled that unless plaintiff posted #30,000 bond his action would be stayed indefinately and petitioner's current action was same as previous action regarding facts and law.

1) The trial court was biased against petitioner at the hearing to declare petitioner a vexatious litigant.

"Bias as applied to a judge is defined as....a predisposition to decide a cause or issue in a certain way" Pacific Etc Conference of United Methodist Church v Superior Court (1978) 82 CA 3d 72, 147 Cal Rptr 48.

The trial court had a strong judicial bias against petitioner, because it stated it was planning to declare petitioner a vexatious litigant at the beginning of the hearing, before all of the evidence oral and written had been heard. (App. 29a, lines 23-26).

According to Witkin, California Procedure, 4th Edition, Action, 342 (regarding the motion and hearing to declare plaintiff a

vexatious litigant), the judge must consider evidence, written or oral, by witness or affidavit material to the ground of the motion.

2) The trial court violated statutory law regarding vexatious litigants in petitioner's case.

The trial court ruled (App.32a) "the court orders this lawsuit stayed, unless and until Mr. Wilson posts an undertaking in the amount of $30,000" and "the vexatious litigant statutes do not appear to authorize dismissal". According to CCP 391.4, "if security ordered is not furnished, the litigation must be dismissed as to the defendant for whose benefit it was ordered."

3) In violation of evidence and law, the trial court ruled petitioner's current action was same as prior action. In his opposition papers and amended complaint (App. 13a,para 7,14a,15a), petitioner demonstrated there were new facts learned subsequent to the filing of the original action and the current complaint was regarding a different right allowable under

California's Primary Rights of Pomeroy.

In the trial courts ruling (App. 31a,#1,#4), it found that petitioner's "present claim, which was regading improper disclosure of private information" and the "facts of the current complaint involved same facts as prior complaint"

B. The appellate court denied Petitioner's request to remove the trial court for bias and broke the law by failing to make a finding on Plaintiff's current action at the time of Defendant's motion to dismiss, which increased Plaintiff's costs of litigation.

Petitioner filed a writ requesting the Appellate Court remove Judge Lane for bias, along with request to stay the trial court's ruling requiring $30,000 bond to proceed. Concerned about his previous complaint with the commission, Petitioner posted the $30,000 bond. The Appellate Court still denied Petitioner's (prohibition) request to remove Judge Lane for bias.(App.33a)

The Appellate Court denied Defendant's motion to dismiss appeal (App. 34a), citing 391.7(b), and stated "in the event this court determines it is frivolous"

According to McColm v. Westwood Park Association (April 7, 1998) 98 Daily Journal D.A.R.3419, which was provided in it's entirety to the appellate court in respondent's motion to dismiss, "Section 391.1-391.6 differ from section 391.7 in some significant ways. Under the former sections, the litigant may proceed with the case without showing a reasonable probability of prevailing, but the litigant will have to furnish security to proceed if the court finds success improbable. Under the latter section, the litigant is barred from filing the action or proceeding if success is considered improbable. When the litigant is subject to a prefiling order, even if the court **finds** high enough probability of success to allow the litigant to proceed, it may

compel the litigant to furnish security as a condition to maintaining the action. Section 391.7's extra burden upon the vexatious litigant arises because a state court has taken a second step in addressing the vexatious litigant problem and has determined that no court or adverse party should be burdened by the particular Plaintiff's merit less litigation." McColm @ 3420, fn. 4.

In other words, according to CCP 391.7, a party cannot as a matter of law be allowed to proceed on a case that is merit less. The court must first make the **determination or finding** there is merit to the litigation. Although the appellate court initially concluded "cause appearing"(App. 34a,para2), the appellate court later concluded "Wilson's appeal is frivolous because it is "totally and completely without merit".(App.9a,para2).

In other motions to dismiss, not involving vexatious litigants, the

courts will defer any ruling until it considers the appeal on its merits. Ferraro v. Southern California Gas Co. (1980)102 CA 3d 33, and Chernett v. Jacques (1988) 202 CA 3d 69

Plaintiff respectfully requests this issue be addressed because it is "integrally related to the principal issues on review and (its resolution) will provide guidance on remand" Lakin v. Watkins Associated Industries (1993) 6 CA 4th 644. Specifically, in the event this court grants this petition to remand, Plaintiff respectfully requests remand to another appellate court in light of (Exhibit 2), which demonstrates that Plaintiff has filed another meritorious complaint with Commission regarding appellate court.

D. At the oral argument hearing, the Appellate Court exhibited open hostility at petitioner.

At the oral argument hearing, (App. 35a) Justices Gilbert, Stone, and Yegan were openly hostile to petitioner. The right to orally

argue one's case is fundamental. More v Board of Regents of University of California (1982) 32 Cal 3d 867 @ 872.

E. In retaliation for being previously reported to the Commission, the Appellate Court wrote an opinion with numerous errors and further requested the trial court judge with demonstrated bias determine the costs of appeal.

The opinion was written by Justices Gilbert, Stone, & Yegan (app. 4a-10a) after petitioner had previously contacted the Commission (App. 36a). The appellate court further requested the triial court determine the costs of appeal (App.10a). The opinion had numerous errors as a matter of law (App. 37a-57a).

F. Even though Petitioner suggested Justices Gilbert, Stone, & Yegan were biased, there were numerous errors in the opinion as a matter of law, and that the current complaint is not barred by the prior appeal's determination of date of

discovery of fraud, because the prior determination was unnecessary, the Appellate Court denied Petitioner's request for rehearing.

Petitioner suggested to the Appellate Court there may be bias and demonstrated error in their opinion (App.44a-48a).

As noted in the opinion (App.7a), the appellate court stated the date of discovery of fraud was determined in the prior action and implied the current action was barred based upon the prior appellate court determination.

However, as noted in Plaintiff's petition for rehearing (App.47a-48a and letter provided to the Appellate Court during their jurisdiction over the case (App. 60a-61a), the issue of "concealed or misrepresented the existence of his letter" was not an issue briefed by either party, not part of the pleadings in the prior complaint of negligence, and not part of the independent review approach that "identifies the issues framed by the pleadings of

negligence". Plaintiff cited as supporting case law, Natural Soda Products Co. v. City of Los Angeles (1952) 109 C.A. 2d 440 "if a finding or determination of an issue was unnecessary to the judgment, it will not have the effect of collateral estoppel". In addition, Plaintiff respectfully requests this court note the appellate court admitted determining the statute of limitations for fraud as well as for negligence in the prior action of negligence (App.22a). In addition, the appellate court further retaliated by declining to correct the numerous erors of law and fact cited in petition for rehearing (App.37a-58a), and failed to have a new panel (app.59a) hear the petition for rehearing even though petitioner requested it.(App.42a)

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests this petition be granted.

Respectfully submitted this _____ day of August 1999.

_____

Robert C. Wilson
Petitioner in Propria Persona